TABLE OF AUTHORITIES

CASES:

STATUTES:

In the

Supreme Court of the United States

October Term, 1952

No. 16

BANKERS LIFE AND CASUALTY COMPANY,
Petitioner

vs.

The Honorable JOHN W. HOLLAND, as Chief Judge of the United States District Court for the Southern District of Florida, and ZACK D. CRAVEY,
Respondents

On a Writ of Certiorari to
The Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

I.

OPINIONS OF THE COURTS BELOW

Bankers Life and Casualty Company was granted leave by the United States Court of Appeals for the Fifth Circuit to file petition for mandamus against the Hon. John W. Holland, U. S. District Judge (R. 1-12). Its purpose was to vacate an order entered under 28 U.S.C. § 1404 (a) transferring a case as to one of several defendants to another district of the same circuit (R. 78): *Bankers Life and Casualty Co. vs. Cravey, et. al.*, (So. D.C. Fla.—No. 4867-M-Civil), unreported. Motion to dismiss this petition was filed on behalf of the Hon. John W. Holland, respondent, and Zack D. Cravey as the person at interest affected by the order of the District Judge (R. 110-111). By judgment dated November 6, 1952, the Court of Appeals sustained the motion to dismiss and dismissed the petition for mandamus upon per curiam holding that mandamus was not an appropriate remedy (R. 130-131). That opinion is reported *sub nom. In re Bankers Life and Casualty Company*, 199 F. 2d 593.

II.

JURISDICTION

This Court granted certiorari pursuant to 28 U.S.C. § 1254 (1). (R. 136) limited to question one presented by petition for the writ which was stated by petitioner as follows:

> "Is mandamus an appropriate remedy to vacate the order of severance and transfer as an unwarranted accumulation of jurisdiction which would compel needless duplicity of trials and appeals to enforce the right to a single trial against all defendants in a proper forum." (Petition p. 6)

III.

STATEMENT OF THE CASE

For the purpose of the limited review sanctioned, a bare statement of the procedural posture of this case will, in the opinion of respondents, suffice.

Bankers Life and Casualty Company, the petitioner here, instituted its action in the Southern District of Florida to recover treble damages for an alleged conspiracy to violate the Anti-Trust acts. The complainant in that action names seven defendants, of which three are natural persons and four are corporations. It is alleged (R. 17) that there were other conspirators who were not joined because they were beyond the jurisdiction of the District Court. Of the natural persons sued, only one was alleged to be a resident of the Southern District of Florida. The complaint does not suggest any basis for the establishment of venue as to the other two individual defendants. Only one of these individual defendants who was a non-resident of the Southern District of Florida, was served with the pro-

case, namely Zack D. Cravey. Cravey, who was a resident of Georgia (R. 14-15), was served with process in the Northern District of Florida (R. 42), and after being so served Cravey filed motion for his dismissal as a party defendant for want of venue (R. 43-44). Upon this motion District Judge Holland concluded that venue was not properly laid as to Cravey and severed the action as to him severed and transferred to the Northern District of Georgia, pursuant to § 1406 (a) of the Judicial Code (28 U.S.C. § 1406(a)) (R. 78). Petitioners instituted in the Court of Appeals was for the purpose of compelling the District Judge to vacate and set aside this order of severance and transfer and to exercise jurisdiction over the person of Zack D. Cravey.

IV.

SUMMARY OF ARGUMENT

While conceding that the Court of Appeals had power to issue mandamus to the District Judge, respondents nevertheless contend that no appropriate case was laid for the exercise of this power. The order of severance and transfer attacked is one which the District Court had power and authority to make. The order of the District Judge will in no way defeat or impede ultimate exercise by the Court of Appeals of the appellate jurisdiction with which it has been vested. There are here no circumstances justifying an exception to the policy established by Congress limiting appellate review generally to cases in which final judgments have been rendered.

V.

ARGUMENT AND CITATION OF AUTHORITIES

At the outset we wish to make it plain that respondent does not question the power of the Court of Appeals to issue the writ. Such power is in our view clearly conferred by § 1651(a) of the Judicial Code (28 U.S.C. § 1651(a)), and its existence has been confirmed by repeated decisions of this Court. The core of the issue is rather the propriety and appropriateness of the exercise of this undoubted power. The dismissal by the Court of Appeals was because that Court deemed the remedy inappropriate, rather than because it doubted its power. (R. 130-131.)

The large grant of power contained in § 1651(a) of the Judicial Code was designed to implement the appellate power of the Court of Appeals as well as other courts and to enable it to protect and effectively exercise that power in exceptional cases not readily or fully reached by the more accepted methods of judicial review. The appropriate exercise of this power, if it is to accomplish its purpose, cannot be confined rigidly within the bounds of precisely defined uses, and thus the furthermost extent of its permissible use can perhaps never be determined. Certainly we do not pretend here to define the greatest possible uses to which it may be put with propriety, and no such definition is necessary. In respondent's opinion, the circumstances here presented are in no material respect different in substance from those situations where the use of writs of mandamus and prohibition have been found to be inappropriate by this Court.

Petitioner at the outset of his presentation accedes to the principle that Judge Holland's order of severance and transfer for want of venue is not presently

reviewable on appeal (Petition and supporting brief, p. 12). We agree that no other interpretation can be given to §§ 1291-1292 of the Judicial Code (28 U.S.C. §§ 1291-1292). Since the early days of this Court it has been recognized that when, as here, Congress limited the right of review to an appeal from a final judgment an allowance of an appeal from an interlocutory ruling would be a "plain evasion" of the act of Congress. *Bank of Columbia vs. Sweeney*, 1 Pet. (U.S.) 567, 569. And in more recent years this principle has been recognized and reiterated in *Roche vs. Evaporated Milk Association*, 319 U.S. 21, 30, in which Chief Justice Stone speaking for the Court stated:

> "Where the appeal statute establishes conditions of appellate review, an appellate court cannot rightfully exercise its discretion to issue a writ whose only *effect* would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals . . . ."

Petitioner recognizes this principle and at page 19 of his main brief quotes a like statement from *De Beers Consolidated Mines vs. U.S.*, 325 U.S. 212, 217. It contends, however, that the case at bar is not an exercise of valid judicial power but that it falls within the exception recognized by the following language employed by this Court in the *De Beers* case:

> "But when a Court has *no judicial power* to do what it purports to do,—*when its action is not mere error but usurpation of power*—the situation falls precisely within the allowable use of Sec. 262." (Emphasis supplied.)

Petitioner contends that the case at bar presents such an instance of usurpation of power, and as against this contention we shall undertake to demonstrate that

diction which it had unlawfully repudiated. Cf. Ex parte Peru, 318 U.S. supra. In the present case the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involves no abuse of judicial power. In issuing the writ the court of appeals below has done no more than to substitute mandamus for an appeal contrary to the statutes and the policy of Congress which has restricted that court's appellate review to final judgments of the district court."

On the authority of *Simons*, *Peterson*, *and Skinner and Eddy Corporation* the circumstances existing in *United States Alkali Export Ass'n, Inc. vs. U.S.*, 325 U.S. 196 at page 204, were thought to have furnished jurisdiction for review on ancillary writ because they were said to be:

> ". . . analogous to those in which this Court has by writs issued under Sec. 262 reviewed the action of the District Courts alleged to be in excess of their authority by which they have foreclosed the adjudication of rights or the protection of interest committed to the jurisdiction of a State officer or tribunal . . . or by which they have been deprived of a trial by jury."

"It appears that the decisions in *Simons*, *Peterson* and *Skinner & Eddy Corporation* in the District Courts were not void but were merely erroneous decisions subject to review on appeal after final judgment in the ordinary way and to that extent they are like the decision of Judge Holland in the case at bar. They are unlike the case at bar in that they were thought to have prevented trial by a jury or foreclosed the adjudication of rights or protection of interests committed to State tribunals. We do not have here the consideration of comity between State and Federal courts exist-

ing in the *Skinner and Eddy Corporation* case, nor do we have, as a result of Judge Holland's order, any denial of trial by jury. The decision of the Court of Appeals for the Second Circuit in *Goldblatt* vs. *Tech*, 203 F. (2d) 79, 80, decided in March, 1953, deems all three of these cases to have turned upon the denial of jury trial and interprets this Court's opinion in *Roche vs. Evaporated Milk Association* and *United States Alkali Export Ass'n., Inc. vs. U.S.* as so holding. There it was said:

> "We think that—as we held in Berenlavsky v. Caffey, 2 Cir., 161 F. 2d 402—we should entertain such a petition which alleges that a jury demand has denied erroneously. The Supreme Court so ruled, per Holmes, J., in Ex parte Simons, 247 U.S. 300, 305, 40 S. Ct. 543, 64 L. Ed. 919, and Ex parte Skinner & Eddy Corp., 265 U.S. 86, 96, 44 S. Ct. 446, 68 L. Ed. 912. True, in Ex parte Simons, the Court spoke as if the question were one of 'jurisdiction,' and in those days (before the Rules) it was common to talk of 'equity jurisdiction'; in Roche v. Evaporated Milk Association, 319 U.S. 21, 32, 63 S. Ct. 938, L. Ed. 1185, the Simons case was apparently so explained. But subsequently in U. S. Alkali Export Association v. United States, 325 U.S. 196, 204, 65 S. Ct. 1120, 1125, 89 L. Ed. 1554, the Court expressly referred to the Simons and Peterson cases as legitimising the use of the writ where an order 'deprived a party of a trial by jury.'"

If the Court of Appeals for the Second Circuit has correctly appraised the reason for the exercise of jurisdiction by ancillary writ in the cases relied upon by petitioner, then those decisions are readily distinguished from the case at bar and afford no support to its position here.

Petitioner also contends that the decision of the Court of Appeals for the Fifth Circuit is in conflict with this Court's decisions in *Los Angeles Brush Co. v. James*, 272 U.S. 701, and *McCullough vs. Cosgrove*, 273 U.S. 93. These decisions may be distinguished from the case at bar because in our opinion they represent an exceptional exercise of a supervisory jurisdiction with regard to the equity rules and the Federal Rules of Civil Procedure.

We submit that the exercise of jurisdiction by a lower court will also be reviewed before final judgment by way of an ancillary writ when the decision is probably erroneous and the case is one of public importance and exceptional character. We suggest that this added element of public importance and exceptional character furnished the reason for review at the interlocutory stage in *Ex Parte Peru*, 318 U.S. 578. The case at bar is wanting in the exceptional characteristics and elements of public importance which furnished the basis for review in *Ex Parte Peru*. In addition, the persuasive element of comity between sovereigns existed there and was thought to be no less controlling than in *Maryland vs. Soper*, 270 U.S. 9; *Maryland vs. Soper*, 270 U.S. 36; *Maryland vs. Soper*, 270 U.S. 44; and *Colorado vs. Symes*, 286 U.S. 510.

Ex Parte Schollenberger, 96 U.S. 369, also relied upon by petitioner may be laid to one side because there the Circuit Court erroneously concluded that it had no power to act for want of jurisdiction over the person of a corporate defendant. *In Re Hohorst*, 150 U.S. 653 may likewise be distinguished for the same reason.

In petitioner's main brief upon the merits, Division I of its argument (brief for petitioner, pp. 9-18) is devoted to supporting the contention that the decision

of District Judge Holland ordering severance and transfer was erroneous and that venue as to defendant Gravy was properly laid in the Southern District of Florida. We shall not undertake to answer petitioner's arguments in this respect, as we do not believe such argument properly falls within the scope of the limited purpose for which certiorari was granted. (R. 196). The Court of Appeals has passed on no question but the question of appropriateness and if their judgment is to be reversed it will then be necessary for the Court of Appeals to consider and act upon the correctness of the District Judge's order.

Respondent contends that this case is ruled by *In re Chicago, Rock Island and Pacific Ry. Co.*, 225 U.S. 273. There the question at issue had to do with jurisdiction of the person of the corporate defendant—a much stronger case than one which deals simply with proper venue. This court there concluded that the District Court obviously had jurisdiction in the first instance to determine whether the corporation had entered a general appearance and that if the District Court erred in deciding that and related questions the corporation concerned would have its remedy by appeal. This case and the principle it announces is recognized and approved in *Roche vs. Evaporated Milk Association*, 319 U.S. 21.

VI

CONCLUSION

In conclusion and by way of summary, respondent contends that the Court of Appeals correctly dismissed the mandamus brought by petitioner as inappropriate Review by mandamus of this interlocutoy decision on the question of venue is inappropriate because the decision is one which the District Court was fully em-

[redacted]

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